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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 430.

EDWARD CONNOLLY,

Petitioner,

v.

FARRELL LINES INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Statement of the Case.

This brief is submitted in opposition to a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which affirmed in part the judgment of the United States District Court for the District of Massachusetts and directed a verdict in favor of the respondent at the close of the petitioner's case.

This action was brought by Edward Connolly, an able-bodied seaman, on the SS *African Grove*, to recover damages because of injuries which he alleged he sustained during his employment on that vessel by respondent, Farrell Lines Incorporated. The petitioner set up three counts in his complaint. It first alleged that the petitioner was entitled to damages under the Jones Act, 46 U. S. C. A.

Section 688; the second count alleged that the petitioner was entitled to damages under the General Maritime Law and alleged a breach by the respondent of its duty to maintain the vessel, its equipment and crew in a safe and seaworthy condition; the third count sought damages under the General Maritime Law for maintenance because of the injuries which petitioner alleges were sustained in the service of the vessel.

At the close of the petitioner's case, motions were made by the respondent for the direction of a verdict in its favor on all three counts. This motion was granted and the Court directed the jury to return a verdict in favor of the respondent on the three counts.

Thereafter, an appeal was taken by petitioner to the Circuit Court of Appeals for the First Circuit and, after argument, that Court sustained in part the action of the Trial Court and affirmed the dismissal of counts 1 and 2 of the complaint. It reversed the dismissal of the third count for maintenance, stating that it believed that there was a question pertaining to that count on which the jury should have passed.

The respondent has been informed by the Clerk of the Court of Appeals for the First Circuit that the Record in that Court has been certified by him and forwarded to the Clerk of the Supreme Court of the United States. All references to testimony hereinafter made are to the pages in said certified Record.

Preliminary Comment Concerning the Petition.

There are no special, important or compelling reasons set forth in the petition for the Court to grant certiorari in this case.

The petitioner failed to prove a *prima facie* case.

One Court heard petitioner's testimony and observed his demeanor as he testified. The Court of Appeals reviewed his testimony carefully and could not conclude that the petitioner had produced any evidence of negligence or unseaworthiness on the part of the respondent causing or contributing to the petitioner's injuries.

The third count for maintenance does not involve any issue of negligence or unseaworthiness. The sole issue raised by that count is whether petitioner was injured in the service of the vessel without misconduct on his part. This point is not presented herein for review.

Statement of Facts.

On or about December 3rd, 1956, the SS. *African Grove* was in the port of New York. Edward Connolly signed foreign articles as an able-bodied seaman on that day. The *African Grove* was and still is owned, operated and controlled by Farrell Lines Incorporated (R. 7). Farrell Lines Incorporated also employed the members of the crew (R. 7). The vessel left New York on December 10th, 1956, and, after a stop at Portland, Maine, sailed for Tenerife in the Canary Islands. It then sailed for Dakar, French West Africa. After Dakar, it called at West African ports, finally arriving at Abidjan on February 10th, 1957.

While the vessel was at Abidjan, Connolly complained of pain in his right ear and he was sent ashore for treatment to a local doctor (R. 20). He returned to the vessel and sailed with it on February 12th for Monrovia, Liberia, arriving there on Thursday, February 14th, 1957.

Upon arrival at Monrovia, he requested permission to again go ashore for medical treatment. On the morning of February 15th at about 10:00 a. m., Connolly went ashore to the Company's office. He was then sent to a local doctor

(R. 46-47). Connolly testified that he was treated and left the doctor's office at approximately 12:30 p. m. with the doctor, who offered to drive him back to the vessel, berthed in the port area, several miles from the business area of Monrovia. When approximately a mile from the vessel, Connolly requested the doctor to drop him off at a restaurant which they were then passing (R. 21, 50-51). Connolly went into the restaurant to have lunch, during the course of which he admits having at least three beers (R. 52). Thereafter, he went into the bar adjacent to the restaurant ostensibly to ascertain the hour the vessel was to sail (R. 22, 47-48). He found therein several of his shipmates who were engaged in a game of dice. Connolly participated in the game, during which time he admits having at least four more beers (R. 54).

One of the other participants in the game was the Galley Utilityman from the *African Grove*, Alexander Phillips (R. 22). The Ship's Carpenter, who was rolling the dice, complained that he was "short" on some bets. At this point, Connolly informed him that the reason for this was that Phillips was not "covering his bets" (R. 23, 55, 56). An argument then developed which ended the game and Phillips is said to have retired to one side of the room while Connolly, continuing to drink beer, was standing with another group. Connolly alleges that in a few minutes Phillips came across the room and assaulted him (R. 24, 57, 58).

After exchange of blows, Connolly succeeded in knocking Phillips down and straddled him while he was prostrate (R. 58). He held him for a few minutes and then Connolly got up and stepped back allowing Phillips to arise. Connolly states that Phillips at this time threatened to kill him and stated that he was going to get a knife. Phillips turned and went out a doorway which Connolly thought led to the

kitchen in the bar. As he saw Phillips leave, Connolly then left by another doorway which led to the open space between the bar and the restaurant (R. 59).

As Connolly got outside the bar, he saw a number of bottles; he selected one and broke off the neck of it (R. 59-60). He stated that he then put the jagged bottle in his pocket. He walked over to the restaurant, a distance of approximately ten feet, and stood there waiting for a period of time (R. 25).

When he did not see Phillips come out, Connolly walked out to the road and walked down it a short distance to a group of men standing there. According to Connolly, they told him that Phillips had gone back to the vessel (R. 60). Connolly states he decided to return to the bar to wait for a short period before returning to the vessel (R. 52).

As he turned and took a step or two toward the bar, he saw Phillips come out of the bar. He admits that Phillips did not have any weapon or other object in his hand (R. 61). Connolly states that he had put the bottle with the jagged edge in his pocket and did not have it in his hand (R. 61). He started to walk toward the bar, allegedly because he wanted to see that the argument, or fight, was terminated peaceably. Although Phillips was at least twenty feet from Connolly when he first noticed him, he continued to approach Phillips. He was approximately three steps away from Phillips when Phillips hit him over the left forehead with a piece of wood, knocking him unconscious (R. 26, 27, 62, 63). Connolly states that he awoke the following morning in a local hospital in Monrovia. He does not know how he got to the hospital nor what, if anything, occurred after Phillips hit him with the aforesaid piece of wood (R. 27).

Connolly also developed by direct testimony of one James Cutrone, Shipping Commissioner of the Port of Boston (R. 34-36a), who appeared pursuant to a subpoena

and brought with him the official log of the *African Grove*, that the official log contained an entry to the effect that on December 28th, 1956 Alexander Phillips returned to the vessel while it was in the Port of Dakar, in an intoxicated condition. Phillips insisted upon attempting to do his regular duties and was ordered by the Chief Steward to go to his quarters, which he refused to do. The Chief Steward thereupon requested assistance from the Chief Officer who ordered Phillips to his room and conducted a search of the room for additional liquor. The official log contains the following notation:

> "Z 461502 was found unfit for duty due to being under the influence of alcohol. He was ordered to his room by the Chief Steward. He insisted on working. The Chief Steward called on the Chief Officer for his assistance, at which time Phillips went to his room, and his room was searched in his presence. No liquor was found there, but one of the ship's knives was found under his pillow" (R. 36).

Counsel for the petitioner examined the respondent before trial by Chief Officer Gundeson whose testimony is set forth in the Record at pages 70 to 78, inclusive. Based on the official log and the testimony of Mr. Gundeson, it appears that during the aforesaid search for liquor, a galley or kitchen knife was found by an unidentified seaman who was assisting Gundeson and the Chief Steward in the search. The unidentified seaman stated that the galley knife was under Phillips' pillow. In his examination before trial, Gundeson admitted that the seaman told him of the finding of the knife under a pillow but Gundeson had to state that he did not see the seaman pick the knife up from under the pillow (R. 77). This testimony did not please the petitioner's counsel and he has been forced to make comments about it in his brief on this petition.

POINT I.

There was not a scintilla of evidence adduced by the petitioner upon which a jury could find negligence of the respondent causing or contributing to Connolly's accident.

In considering a motion for a directed verdict at the close of the plaintiff's case, the Court must give the plaintiff's evidence every favorable inference. From the facts it is clear that there was no testimony by Connolly that he or anyone else during the course of the voyage, which commenced on or about December 10th, 1956 up to and including February 14th, 1957, ever had any argument or fights with Phillips. It is true that Connolly has testified that there were complaints about the food but none of them in any way had words with Phillips. Connolly had to admit that he never had any difficulty with Phillips. He knew of no occasion wherein Phillips had ever been engaged in a fight while employed on a vessel (R. 20).

Under the general law of negligence, a plaintiff must show that the individual who is claimed to be of unusual disposition had in the past acted in such a way that the defendant had, or by the exercise of reasonable care, should have had knowledge of the vicious propensities of that individual. The failure of Connolly to show any such vicious propensities existing in Phillips prior to the alleged assault precludes him from any recovery for negligence upon the part of the respondent.

The Supreme Court of the United States in its decision in the case of

Boudoin v. *Lykes Brothers Steamship Co.*, 348 U. S. 336, 99 L. Ed. 354, 75 S. Ct. 382

recognized that there existed a difference between the conduct of seamen as a class and ordinary people working ashore. The language used by the Court in that case, at page 339 (U. S.) particularly as hereinafter quoted, shows that the petitioner failed in his burden of proving a *prima facie* case.

> "The warranty of seaworthiness is a species of liability without fault. *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483; Seas Shipping Co. *v.* Sieracki, 328 U. S. 85, 90-94, 90 L. Ed. 1099, 1103-1105, 66 S. Ct. 872. Yet it does not mean that the shipowner is liable for injuries 'resulting from every sailors' brawl,' as Judge Learned Hand put it in Jones *v.* Lykes Bros. S. S. Co. (CA 2d NY) 204 F. 2d 815, 816. It does not mean that the owner is liable every time a seaman gets drunk and does damage to a member of the crew. It does not mean that the owner is liable for injuries from all the fisticuffs on shipboard.
>
> "All men are to some degree irascible; every workman is apt to be angry when a fellow complains of his work to their common superior; and some will harbor their resentment and provoke a quarrel over it even after the lapse of several hours. Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the 'disposition' of 'the ordinary men in the calling.'" Jones *v.* Lykes Bros. S. S. Co., *supra* (204 F. 2d 817).

There was not one bit of evidence that Phillips at any time had ever carried a knife on his person. There was not one bit of evidence that Phillips was an individual of quarrelsome nature; that he had been involved in any quarrels or disputes, and there was no evidence of any occurrence which might have put the respondent on notice that Phillips

was a vicious individual. Under the circumstances, the Court acted properly in refusing to allow the matter to go to the jury. The Court's holding in effect was that Connolly had not proved a *prima facie* case and, consequently, the Court directed a verdict for the defendant on the first count wherein Connolly sought damages under the Jones Act.

POINT II.

There is not a scintilla of evidence that the SS. *African Grove* was unseaworthy or that the respondent breached any duty imposed upon it by law.

In view of the admitted facts that Connolly and Phillips had their fight ashore and that it was because of the actions of the men in a "crap" game while both were drinking, there certainly can be no question that any unseaworthiness of the vessel itself or its equipment was a contributing factor to the injuries. The only possible basis for the petitioner to recover under the doctrine of unseaworthiness is that Alexander Phillips was a person of such unusual disposition, of such viciousness and brutality that merely having him employed on the vessel was sufficient to cause the vessel to be unseaworthy and for the respondent to be responsible by reason of an alleged breach of warranty of furnishing a proper and competent crew.

We by-pass as unnecessary for discussion the question of whether the petitioner is entitled to have the issue of unseaworthiness determined by a jury. It is not considered that such a determination need be made for this Court to affirm the action of the Court below. The *Boudoin* case, *supra*, has limited the case of *Keen* vs. *Overseas Tankship Corp.*, 194 F. 2d 515 which was the first modern application

of the doctrine of unseaworthiness to fights between members of the crew. The language of the *Keen* case would indicate that the assaulter in any situation on a vessel would be an individual whose actions, *ipso facto*, would make the employer responsible to the assaulted. However, the *Boudoin* case, *supra*, clearly pointed out that the Courts must recognize that seamen as a whole are a group of men living by their hands and whose ordinary response to insults or injustices is with their hands. The Court recognized that arguments between seamen are frequently settled by fights, some of which, by reason of the individuals, are vicious and extremely damaging to the parties. In the *Boudoin* case, *supra;* the Court has stated in substance that the ordinary fight which occurs between seamen is not such a situation that would put the defendant on notice that the winning seaman was a person of unusual disposition; of such unusual viciousness and brutality that he should not have been employed.

On this point, the Second Circuit Court of Appeals held in *Stankiewiz* vs. *United Fruit Steamship Corporation, et al.*, 229 F. 2d 580, 581, that the mere fact that a seaman often drank, was belligerent, boisterous, loud, sometimes started fights, was argumentative and on occasion was apparently drunk did not render a ship unseaworthy, nor did it establish by sufficient evidence that such a seaman was of a wicked disposition with a propensity to evil conduct and of a savage and vicious nature.

Considering the facts in this case, it appears that Connolly made no attempt to avoid a second "meeting" with Phillips. He saw Phillips come out of the bar when he was at least 20 feet away from Phillips. Connolly admits that at that time Phillips did not have any weapon. Connolly states that at this time he was carrying the bottom portion of the bottle from which the neck had been broken in his

pocket so that Phillips could not know that he had the bottle. This is incredible because, as the Court will recognize, the jagged edges of the broken bottle would not only have ripped Connolly's trousers but they would also have dug into his leg as he was walking. It was Connolly's deliberate act of forcing the issue that caused him to be struck with the piece of lumber which Phillips picked up only as Connolly approached him. If Connolly when he saw Phillips come out of the bar unarmed had turned and proceeded back to the vessel, there would have been no assault. The only logical conclusion from the facts is, as stated by Judge Ford,

> "• • • he didn't have any disposition to get out of a fight. He had a disposition with the jagged bottle in his pocket to get into a fight, which he did. But Phillips beat him to it." (R. 86-87)

It is submitted that this case does not fall within the situations encountered and dealt with in the cases of

Kyriakos v. *Goulandris, et al.*, 151 F. 2d 132;
Jones v. *Lykes Bros. Steamship Company, Inc.*, 204 F. 2d 815;
Kelcey v. *Tankers Company*, 217 F. 2d 541;
Handley v. *United States of America*, 157 F. S. 616.

Each of these cases dealt with unusual situations and actions by seamen which clearly exceeded the course of conduct which would ordinarily be expected of seamen. In the situation involving Connolly and Phillips there is nothing more than a barroom brawl which occurred ashore and away from the ship. It does not come within the principles of liability for a breach of warranty of seaworthiness as laid down in the above cases.

Connolly has failed to sustain his burden of proof that the respondent breached any duty imposed upon it by law.

POINT III.

The District Court's action in directing a verdict for the respondent was proper in the case.

Because of the petitioner's failure to adduce any probative evidence establishing negligence or unseaworthiness, the Trial Court was correct in directing a verdict for the respondent. In the absence of proof of negligence or unseaworthiness, the District Court had no choice but to direct the verdict.

> *Mildred L. Miller, et al.* v. *Farrell Lines Incorporated*, 1957 (C. C. A. 2), 247 F. 2d 503 at 506, Cert. denied 355 U. S. 912, 2 L. Ed. 2d 273, 78 S. Ct. 342.

The burden of proof required under the Jones Act was outlined by that Court as follows:

> "In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought. Rogers *v.* Missouri Pacific R. Co., 1957, 352 U. S. 500, 77 S. Ct. 443, 459, 1 L. Ed. 2d 493; Ferguson *v.* Moore-McCormack Lines, Inc., 1957, 352 U. S. 521, 77 S. Ct. 457, 459, 1 L. Ed. 2nd 511. The burden of showing this causation rests on the plaintiff. Johnson *v.* New York, N. H & H. R. Co., 2 Cir., 1952, 194 F. 2d 194, reversed on other grounds 344 U. S. 48, 73 S. Ct. 125, 97 L. Ed. 77; Pittsburgh S. S. Co. *v.* Palo, 6 Cir., 1933, 64 F. 2d 198. In this case the plaintiff did not introduce evidence of any probative facts to show that the defend-

ant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations."

In the same case, the Court also stated at page 507:

"The District Judge would have been justified in granting the defendant's motion for a directed verdict, either at the end of the plaintiff's case, or at the conclusion of the entire case. In any event Judge Palmieri's direction of a verdict for the defendant, even after the jury verdict, was clearly right."

There is no requirement that the Trial Court hear the entire case when it is satisfied that the plaintiff has failed to meet his burden of proof. In the absence of any issue upon which reasonable men may differ, there is no purpose for a trial to continue beyond the plaintiff's case. In the case now before the Court, the substance of all of the evidence offered by Connolly is that he differed with Phillips over a dice game, tempers soared with the assistance of alcohol, and a fight resulted. The fight did not occur aboard ship—it occurred some distance from the ship in a barroom. Connolly won the first round in the barroom itself. Then, anticipating further difficulty, he armed himself with a jagged broken glass bottle. He lost the second round, however, because Phillips met force with force and forestalled the use by Connolly of his weapon in effectively rendering Connolly unconscious, with the aid of a piece of wood.

Conclusion.

The decision of the Court of Appeals insofar as it affirms the District Court should not be disturbed. This petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
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